United States Government
National Labor Relations Board
OFFICE OF THE GENERAL COUNSEL

Advice Memorandum

DATE: August 28, 2003

TO : Robert H. Miller, Regional Director
Joseph P. Norelli, Regional Attorney
Tim Peck, Assistant to Regional Director
Region 20

FROM : Barry J. Kearney, Associate General Counsel
Division of Advice

SUBJECT: Renzenberger, Inc.
Case 20-CA-31331-1

This case was submitted for advice as to whether the Employer violated Section 8(a)(5) by refusing to provide the Union with information relevant to an employee's discharge, where the Union had requested the information with an express purpose of "preparing for any unfair labor practice charge that may be filed." We conclude that the Employer violated Section 8(a)(5) because the Union had requested bargaining over the discharge, and the information sought was relevant and necessary for the Union to perform its duties as bargaining representative.

The Employer is engaged in the transportation of railroad and airline crews throughout the United States. On February 11, 2003, the Union was certified as the Section 9(a) representative of the road and yard drivers at the Employer's Central and Northern California facilities. The parties have not succeeded in reaching an initial collective-bargaining agreement.

On May 28, employee Brady Jones was terminated for allegedly speeding in the Employer's yard in his company-owned vehicle. Union representative Skjelstad asked Employer manager Dunfee to bargain with the Union regarding the termination and Dunfee refused. On June 5, Skjelstad repeated his request by letter as follows:

> Please accept this letter as a formal request to bargain over the termination of Brady Jones for allegedly speeding in the [yard].
>
> To prepare for any NLRB charges that may be filed, please provide the following information:
>
> 1) copy of his written termination
> 2) copies of all records, disciplinary notices or warnings issued to Jones

3) copies of all supervisory notes relating to his termination
4) copies of all disciplinary notices, warnings or records of disciplinary personnel actions for the last year
5) make, model and serial number of radar unit used to determine speed violations
6) maintenance history of radar unit included but not limited to calibration records
7) training courses taken by the operator of the radar unit

The Employer refused to discuss the discharge. Initially, the Employer also refused to provide any information. On July 11, the Employer provided items 1, 2, 3, 6, and 7, but has not provided items 4 and 5.

It is well settled that the duty to bargain in good faith obligates an employer to furnish a union with relevant information necessary for it to perform its duties as bargaining representative.[1] The Union sought to bargain over Jones' discharge, and requested information that plainly was relevant to enable it to engage in that bargaining.

Although the Union based its request for information in part on its stated need to "prepare for any NLRB charges that may be filed," and in fact several weeks later filed a charge, the information was not sought solely to enable the Union to obtain pretrial discovery in the litigation of its charge.[2] The rationale for the Pepsi-Cola rule is that, if a union is not seeking information for the purpose of performing its representational duties within the collective-bargaining process, but is seeking to discover information that would assist its litigation of a matter before the Board, the Board's pre-trial discovery rules privilege the employer's refusal to turn over information relevant to the issues in litigation. That rationale applies only where the union is not seeking information for the purpose of grievance filing, collective bargaining, or contract administration.[3]

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[1] NLRB v. Truitt Mfg. Co., 351 U.S. 149 (1956).

[2] See Pepsi-Cola Bottling, 315 NLRB 882 (1994).

[3] See Huck Mfg. Co., 254 NLRB 755 (1981) (Board held that, where union chose to prosecute an employee discharge before the Board, rather than to seek to bargain about it with the

Here, the Union sought to bargain over the discharge and the Employer refused. The Union's formal letter requesting information reiterated as "a formal request" the earlier request to bargain and also stated that NLRB charges "may" be filed. Under these circumstances, we conclude that the Union sought the information to assist it in bargaining over the termination, and that the Employer unlawfully refused to provide information clearly relevant to the Union's representational duties. The fact that the information also could be used to prepare for unfair labor practice charges that might ultimately be filed does not privilege the Employer's conduct under the Board's pre-trial discovery rule.

Accordingly, the Region should issue complaint, absent settlement.[4]

B.J.K.

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employer, union was not entitled to information pertinent to the charge).

[4] The complaint should also include an unlawful refusal to bargain allegation. See Ryder Distribution Resources, 302 NLRB 76, 90 (1991) (in the absence of a contractual grievance/arbitration procedure, employer refused to bargain over an employee discharge; Board held that employer violated Section 8(a)(5) because a "grievance about a discharge" is a mandatory subject of bargaining); Crestfield Convalescent Home, 287 NLRB 328 (1987) (same). See also Pepsi-Cola Bottling Co., 330 NLRB 900, 904 (2000) (disciplinary rules, including rules related to termination for moving violations and accidents, are mandatory subjects of bargaining).